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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 678

Case No. 715: LUKAS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero; Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 1 March 1993, Ellen Lukas, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia, to:

> "... implement Administrative Tribunal Judgement No. 544 (Lukas) of 8 November 1991 ..."
>
> and
>
> "... [find that] the Secretary-General has failed to exercise ... his authority as the Chief Administrative Officer of the Organization (Charter, Article 97) and ... to use all means available to him ..., in order to secure due respect for his decision of 13 March 1990 (...) and for Administrative Tribunal Judgement No. 544 (Lukas);
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> ..."
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> and
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> "... to order that the Secretary-General pay the Applicant an amount equivalent to two (2) years of her current salary as compensation for the serious professional and personal injury and hardship suffered by the Applicant ...

> ... to order the Secretary-General to secure apologies from the authors of the memorandum of 23 September 1992 (...) for their injurious and false statements concerning the Applicant's professional qualifications and experience.
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> ... to order that the implementation of the Applicant's promotion to P-4 be backdated to the time of the Secretary-General 's decision, ..."

Whereas the Respondent filed his answer on 1 June 1994;

Whereas on 13 July 1994, the Applicant submitted written observations;

Whereas, on 19 October 1994, the Tribunal put questions to the Respondent, to which he provided answers on 1 November 1994;

Whereas, on 24 October 1994, the Applicant submitted further written observations;

Whereas, on 4 November 1994, the Applicant submitted additional observations;

Whereas the facts in the case are as follows:

The Applicant served the United Nations from 1969 to 1972, as an Information Officer and again from 15 November 1976, under a fixed-term appointment at the P-3 level which was extended from time to time and converted to a probationary appointment on 15 April 1979. On 1 February 1980, she was granted a permanent appointment in the Department of Public Information (DPI).

As a result of the restructuring of DPI in 1987 and 1988, a number of organizational units were to be replaced by new ones and their posts and resources allocated accordingly.

On 8 April 1988, the Applicant was advised that, under the new staffing table, she would be placed immediately as Information Officer in the Communications Services Section of the Communications and Project Management Service. However, she could apply for other posts to be advertised. The Applicant applied for a P-4 post in the Human Rights and Development Programmes Section of the Communications and Project Management Service. She was short-listed for the post by the ad hoc Departmental Selection Committee, along

with two other candidates. None of them was selected. On 5 May 1989, the post was advertised, the section to which the post belonged having been renamed "Economic and Social Development and Human Rights Programmes Section". The Applicant again applied for the post but was not selected.

On 2 May 1989, the Applicant requested the Secretary-General to review the administrative decision to re-advertise the post for which she had been short-listed, as the decision not only violated the rules agreed on between the Department and the staff, but would have a direct negative impact on her terms of employment within the United Nations. In a reply dated 19 May 1989, the Assistant Secretary-General for Human Resources Management (OHRM) informed the Applicant that the Secretary-General had decided to maintain the decision to re-advertise the post in order to seek additional candidates with experience in developing countries.

On 23 May 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision not to select her for promotion to a P-4 position of Human Rights Information Officer in DPI. The JAB adopted its report on 28 February 1990. It concluded and recommended as follows:

> "55. The Panel concludes that although the selection process had certain shortcomings and reflected poor judgement on the part of management, the appellant has failed to sustain the burden of proving that the contested decision was motivated by extraneous factors, e.g., discrimination against the appellant because of her nationality, or personal prejudice.
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> 56. The Panel concludes also that the contested decision did not, per se, constitute a violation of the Staff Rules, nor did it substantively violate the internal selection procedures of DPI.
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> 57. The Panel recommends, in view of the unfortunate manner in which the selection process was handled and the unfairness resulting to the appellant therefrom, and in view also of the appellant's competence and experience, that DPI make substantial efforts, promptly, to locate a suitable P-4 post for the appellant."

On 13 March 1990, the Officer-in-Charge of the Department of Administration and Management transmitted a copy of the JAB report to the Applicant and informed her, in part, as follows:

> "The Secretary-General has ... decided to maintain the contested decision. The Secretary-General has further decided, to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested, taking into account the entire circumstances of your case, and to take no further action on the matter."

On 11 June 1990, the Applicant filed an application with the Tribunal contending, inter alia, that the Under-Secretary-General for DPI had consistently denied her fair consideration for all vacancies for which she had applied despite the recommendation of the JAB and the Secretary-General's decision of 13 March 1990.

On 8 November 1991, the Administrative Tribunal rendered its Judgement No. 544, Lukas, in which it said, inter alia:

> "VI. It is therefore the Tribunal's opinion that new efforts should be made in good faith to fulfil the Secretary-General's commitment and that, while the Applicant is not entitled to single out or to choose the post to be assigned to her, nevertheless the renewed efforts should take into consideration all the conditions mentioned by the Secretary-General when ordering that efforts should be made to have the Applicant placed in a 'suitable P-4 post for which you are qualified and interested'. It appears from information received from the Respondent by the Tribunal that promotion of the Applicant to the P-4 level has taken place. However, this should not affect the renewed efforts referred to in this paragraph.
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> ...
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> IX. For the injury suffered by the Applicant as a consequence of her unfair treatment in connection with the Secretary-General's decision conveyed to her on 13 March 1990, the Tribunal orders the Respondent to pay to the Applicant one year of net base salary at level P-4, step VIII."

On 30 October 1991, the Tribunal was advised that, with effect from 26 August 1991, the Applicant had been promoted to the

P-4 level, but the Applicant did not formally accept the post to which she had been assigned concomitant therewith. In a memorandum dated 23 December 1991, she agreed to fulfil its duties of Chief Editor, only on a temporary basis, "until a P-4 which fulfils the Secretary-General's commitment to me of 13 March 1990 is available". She added, inter alia, that:

> "[T]his does not change my legal position that this post does not fulfil the requirements of the Secretary-General's decision and the Tribunal Judgement No. 544, and I will continue actively to seek full implementation of the Secretary-General's commitment and the Tribunal Judgement."

On 10 January 1992, the Assistant Secretary-General, OHRM, advised the Applicant, inter alia, as follows:

> "In view of the fact that the Department of Public Information (DPI) did not find that you were qualified for the vacant P-4 posts for which you subsequently applied, it was decided to promote you to the P-4 level outside the normal procedures of Vacancy Management, and to assign you some of the functions discharged by [another staff member] at the time. The decision you are now challenging simply implements the administrative and budgetary aspects of your promotion. The Administration is fully aware of the terms of Judgement No. 544, and sees the decision communicated to you on 3 December 1991 as a partial fulfilment of the commitment given to you on 13 March 1990.
>
> It is my understanding that, upon the departure of [another staff member] on 31 December 1991, you were assigned the full functions of his P-4 post, pending the occurrence of a vacant P-4 post for which you would be qualified, and in which you would be interested. The fact that you have been promoted to the P-4 level will greatly facilitate any change in attribution of functions since a lateral transfer is all that will be required for that purpose.
>
> Let me assure you that the complete resolution of your case is a high priority for all concerned. ..."

In a reply dated 6 February 1992, the Applicant contested the statement that she was not qualified for the posts for which she had applied.

On 20 May 1992, the Applicant applied for the P-4 level post of Human Rights Information Officer, DPI, (Post No. UNA-27773-E-P4-002) (DPI/ESDHR/Human Rights Officer) that was soon to become vacant. In a letter addressed to the Under-Secretary-General for Public Information, the Applicant enclosed her resumé and briefly stated the reasons she considered herself qualified for the position.

On 2 July 1992, the Assistant Secretary-General, OHRM, wrote to the Under-Secretary-General, DPI, with respect to the 1992 Promotion Review. He noted that the Applicant was among those staff members entitled to special consideration. He referred to the letter of the Secretary-General to Applicant, dated 13 March 1990, and Judgement No. 544, Lukas, dated 8 November 1991. He concluded by stating that a "full discharge of the commitment given by the Secretary-General to [the Applicant] requires that she be assigned to a post for which she is qualified and interested". He further stated that the Applicant should receive "priority consideration for any vacant P-4 posts in which she has expressed an interest, before such posts can be used for promoting other staff members."

According to the record, the Applicant was offered a number of posts, including: Project Manager for Social Development Information; Project Manager for the 1993 International Year for Indigenous People and for the 1994 International Year of the Family.

On 28 August 1992, the Applicant reiterated her application for the post of Human Rights Information Officer and declined the offer for the post of Project Manager for Social Development Information.

On 23 September 1992, the Director of the Communications and Project Management Division advised the Applicant, in a detailed communication, that in the Department's view, she was not qualified for the post of Project Manager for Human Rights in which she had expressed an interest in May 1992 and which had become vacant on 14 September 1992.

On 28 September 1992, the Applicant requested a review of this decision and also asked for the Secretary-General's agreement

to the direct submission of her appeal to the Administrative Tribunal.

Not having received a substantive reply to her request, on 18 November 1992, the Applicant lodged an appeal with the JAB, in which she also requested, under staff rule 111.2(f), a suspension of action to be taken to fill the Human Rights Information Officer post until her appeal on the merits had been considered by the JAB.

On 25 November 1992, the JAB adopted its report on the request for a suspension of action, and recommended as follows:

> "18. The Panel, having carefully examined the documents pertaining to the appeal and taking into consideration the statements made by both parties at the hearing, accepted the Appellant's request for suspension of action under staff rule 111.2(f).
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> ...
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> 20. The Panel noted that, in her appeal, the Appellant had made a prima facie case which merited full consideration.
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> 21. The Panel further observed that, if the request for suspension of action on the contested decision were denied, the Appellant would be left without an effective remedy, should her appeal result in a recommendation in her favour.
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> 22. Accordingly, the Panel unanimously recommends that all action to fill the post in question, or any personnel action with respect to any recommendation to confirm the assignment of any staff member to that post or to assign its functions to anyone, be suspended, pending the completion of the appeal."

On 9 December 1992, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General ... has noted that the post to which you wish to be appointed is among those which cannot be filled until a decision is made as to whether it is decided either to keep the post where it was budgeted, or to redeploy it temporarily to another programme, or to freeze it for future use in a priority area. Therefore, no action can be taken at the moment in regard to the post. Under these circumstances, the Board's recommendation for suspension of action is not relevant at this stage. However, to accommodate the concerns of the Board, the Secretary-General

decided that, should the decision be taken to keep the post in the Department, it would be filled on only an interim basis until the final decision of the Secretary-General on the substance of your appeal."

On 15 January 1993, the JAB adopted its report on the merits of the case and recommended as follows:

"30. The Panel considered that what the Administration has done so far in this case has been done solely in order to comply pro forma with what it was obliged to do and even this was not done in an appropriate manner. Furthermore, if the Administration had acted appropriately, this appeal would not have had to be submitted. In light of the above, the Panel recommends that the Administration make stronger efforts to identify a post of [sic] which the Appellant is suitable and in which she is interested.

31. At the same time the Panel unanimously recommends that, pending the placement of the Appellant in such a post, the P-4 post of Human Rights Information Officer, DPI, should not be filled by another candidate - neither through lateral transfer nor otherwise.

32. Bearing in mind that the Appellant is due to retire in September 1993, the Panel unanimously urges the Secretary-General to take the recommended action without further delay."

On 21 January 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her, inter alia, as follows:

"The Secretary-General ... agrees with the Board that you do not have a right to any particular post. However, given that priority consideration for any post can come into play only among candidates who are equally qualified and in view of the fact that the Department established that there were other candidates who were better qualified for the post than you, he is unable to share the Board's opinion that the selection process for the P-4 post of Human Rights Information Officer was not conducted in an appropriate manner. Accordingly, he must reject the Board's recommendation that the subject post should not be filled until you have been placed in a post for which you are interested.

Based on the record, the Secretary-General is also unable to share the Board's opinion that the efforts made so far by the Administration to locate a post for which you are qualified and in which you are interested were only pro forma. Nevertheless, the Administration shall continue its efforts to identify a post for which you are qualified and in which you are interested."

On 1 March 1993, the Applicant filed with the Tribunal the application referred to above.

The Applicant separated from service on 30 September 1993.

Whereas the Applicant's principal contentions are:

1. The Secretary-General breached the Applicant's terms of appointment, in failing to fulfil his commitment, as expressed in his letter of 13 March 1990, to give her full and fair consideration, on a priority basis, for a vacant and suitable P-4 post for which she was qualified and interested.

2. The Respondent failed to implement Judgement No. 544, Lukas.

Whereas the Respondent's principal contentions are:

1. The Respondent fully complied with his obligation to the Applicant by identifying and offering to her a number of posts in accordance with Tribunal Judgement No. 544, Lukas.

2. The Applicant has failed to establish her allegations of bad faith and/or prejudice in the Respondent's implementation of Judgement No. 544.

3. The Applicant is not entitled to any further compensation.

The Tribunal, having deliberated from 19 October to 9 November 1994, now pronounces the following judgement:

I. On 13 March 1990, the Applicant was informed that, in accordance with the Joint Appeals Board (JAB) recommendation, "the

Secretary-General has further decided to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested." The Applicant claimed that the Secretary-General had not fulfilled this pledge. In 1990, she filed an appeal requesting the Tribunal to order the Secretary-General to do so.

II. While the case was before the Tribunal, the Applicant was recommended for promotion to the P-4 level. This recommendation was supported by the Office of Human Resources Management, as stated in a memorandum dated 11 October 1992, "as an exception to the Vacancy Management procedures, with a view to implementing the decision of the Secretary-General in her case."

III. On 8 November 1991, the Tribunal rendered its Judgement No. 544. The Tribunal held that the efforts made by the Respondent to date had only partially fulfilled the Secretary-General's commitment and that "new efforts should be made in good faith to fulfil the Secretary-General's commitment." On 3 December 1991, the relevant P-5 Personnel Action form was completed and the Applicant's promotion to the P-4 level was implemented, with effect from 26 August 1991. This decision was considered by the Administration in a memorandum dated 10 January 1992, as only "a partial fulfilment of the commitment given ..."

The post against which the Applicant was placed was that of Chief Editor in the Communication Services Section. The Applicant claimed that the post did not "fulfil the requirements of the Secretary-General's decision and the Tribunal's Judgement No. 544". Nevertheless, she accepted it on 23 December 1991, albeit "on a temporary basis until a P-4 [post] which fulfils the Secretary-General's commitment ... of 13 March 1990 is available."

IV. On 20 May 1992, the Applicant wrote to the Under-Secretary-General for Public Information, expressing her interest in the post of Human Rights Information Officer. In her letter, she pointed out

that she could be assigned to that post by a lateral transfer. This post was to become vacant following its incumbent's request for a transfer on account of the excessive workload involved. This fact was not unknown to the Applicant. In view of the circumstances, the Chief, Economic and Social Development and Human Rights Programmes Section, Communications and Project Management Division (CPMD), DPI, suggested, on 22 July 1992, in a memorandum to the Director, CPMD, that "the workload on human rights be divided between two people: one person to handle the World Conference on Human Rights and the International Year for Indigenous People and the other to handle the on-going regular human rights programme." She added that "if it is your decision to agree to [the Applicant's] request to become the Project Manager for Human Rights, then it is my understanding that she would transfer to this Section, with her post, to undertake the project management functions associated with the on-going human rights programme."

V. The Applicant denies that this suggestion was followed by a formal offer made to her. Nevertheless, the Applicant was aware of the initiative and of the possibility of it leading to an offer. In her submission before the JAB, the Applicant says that "the next step the Director and the Section Chief took was to prepare to divide the human rights job into two P-4 posts so that one person (not me) would have the responsibilities of the World Conference and another person (me) would handle human rights publications. I discussed this manoeuvre with the DPI Acting Executive Officer on August 17 and also with several colleagues who came to me informally to find cut how I would react to this arrangement." It is, therefore, clear that the Applicant was aware of the Administration's intentions and that her reaction towards them was negative. It is equally clear that the Administration was also aware of her negative attitude.

VI. According to the Applicant, on 21 August 1992, she was informed that her request for a lateral transfer to the Human Rights

Information Officer post had been rejected. The Director CPMD/DPI on 23 September 1992, informed her that her request had been refused on the grounds of her insufficient qualifications. The letter elaborates extensively on this issue. Instead, she was offered a choice between two posts; Information Officer for Social Development or Information Officer for the Year of the Indigenous Peoples and the 1994 Year of the Family.

VII. The Applicant turned down these offers saying that they were not P-4 posts and therefore did not fulfil the Secretary-General's commitment. In her letter to the Under-Secretary-General for Public Information dated 28 August 1992, after refusing the offers made to her, the Applicant added that she would "continue to press for a lateral transfer to the Human Rights Information Officer job." On 28 September 1992, the Applicant requested the Secretary-General to reverse the decision refusing her the Human Rights Information Officer post.

VIII. On 18 November 1992, the Applicant lodged an appeal with the JAB. The JAB adopted a report favourable to the Applicant. The Secretary-General did not accept the JAB's recommendations. The Applicant then appealed to the Tribunal and requested that it find that the Secretary-General had "failed to perform his commitments" and "failed to implement Administrative Tribunal Judgement No. 544, Lukas".

IX. In the light of the foregoing sequence of events the Tribunal finds:

(a) That a number of offers were made to the Applicant in order to provide her with a suitable P-4 post.

(b) That these offers appear to have been made in good faith, though the Applicant did not consider the posts to be at an adequate level of responsibility.

(c) That the suggestion of dividing the functions of the Human Rights Information Officer post sought by the Applicant was not motivated by an intent to give the Applicant only the least important functions involved.

(d) That the suggestion to divide the post was prompted by its excessive workload, a circumstance that had led its previous incumbent to request a transfer.

(e) That, even if a formal offer was not made, the Applicant was sounded out as to whether she would accept the new P-4 post which would have included part of the duties of the P-4 post she sought.

(f) That the Applicant reacted negatively to such a possibility.

(g) That, in fact, the whole recourse procedure initiated by the Applicant is directed solely against the decision not to grant her a lateral transfer to the P-4 Human Rights Information Officer post. In her submission to the Secretary-General dated 28 September 1992, the Applicant requested review of the decision refusing her that post and in her pleas before the JAB she asked to be "placed against the Human Rights job for which I applied."

(h) That the Applicant's attitude in this respect is not in keeping with Judgement No. 544, Lukas, paragraph VI, in which the Tribunal held that the Applicant was "not entitled to single out or to choose the post to be assigned to her."

(i) That the Secretary-General's commitment referred to a post for which the Applicant would be duly qualified.

(j) That the Applicant's qualifications were appraised freely by the Administration as provided by the relevant Rules and Regulations and that the refusal to accept her request for the post she sought was not based on prejudice or other extraneous factors.

X. For the foregoing reasons, the Tribunal decides:

1. That the Secretary-General has not acted contrary to his commitment by refusing the Applicant's request for a transfer to the Human Rights Information Officer post.

2. That the Administration has made reasonable efforts to honour the Secretary-General's commitment.

XI. The Applicant also asks the Tribunal to order the Director CPMD/DPI to offer apologies for statements contained in his letter to the Applicant dated 23 September 1992. The Tribunal declines to do so since the Applicant cannot assert a claim of defamation of her reputation on account of an internal letter of this nature directed to her.

The Applicant also requests that her promotion to the P-4 level be given an earlier implementation date that would enable her to obtain an improvement in her pension. This point was not part of the Applicant's original recourse and was not submitted to the JAB. The Tribunal therefore cannot entertain it.

XII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

New York, 9 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary